BULYAH ISHAK & ANOR v. AMBANK (M) BHD & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
PRASAD SANDOSHAM ABRAHAM JCA
ZAMANI A RAHIM JCA
ASMABI MOHAMAD JCA
[CIVIL APPEALS NO: B-02(NCVC)(W)-638-04-2016 &
B-02(NCVC)(W)-803-04-2016]
2 OCTOBER 2017

LAND LAW: *Interest in property – Recovery of – Ownership – Purchase price of property fully paid by deceased – Deceased's wife appointed as administrator of deceased's estate upon death of deceased – Whether irrevocable power of attorney executed – Whether deceased rightful owner of property – Developer charged property to bank without administrator's consent – Whether void ab initio – Whether developer merely a bare trustee – Whether developer authorised to deal with property – Whether developer had right to charge property to bank – Whether bank a bona fide party*

EVIDENCE: *Adverse inference – Non-calling of material witnesses – Whether witnesses in best position to provide evidence – Whether provision of s. 114(g) of Evidence Act 1950 ought to be invoked*

The plaintiffs were the joint administrators of the estate of Nor Zainir Rahmat ('the deceased'). Pursuant to a sale and purchase agreement, the deceased had agreed to purchase a piece of property ('the property') from the first defendant company ('the first defendant') and had paid the purchase price in full. By the first power of attorney, the first defendant named the deceased 'attorney' of the property, followed by a second power of attorney whereby the deceased appointed his wife, the first plaintiff, as 'substitute attorney'. After the death of the deceased, the first plaintiff discovered that the first defendant, who was no longer the owner of the property, had charged the property to a bank ('the fourth defendant'). The plaintiffs lodged a private caveat over the property but the same was removed. The fourth defendant served the first plaintiff with cause papers pertaining to an action commenced by the fourth defendant, seeking, amongst others, an order for sale of the property. An order for sale was granted and the property was scheduled for auction. The plaintiffs filed an action to recover the property. The trial judge allowed the plaintiffs' claim against the first defendant and declared that the deceased was the beneficial owner of the property. However, the plaintiffs' claim against the fourth defendant was dismissed and the trial judge had ordered the fourth defendant to proceed with the auction of the property to recover the amount due to it and if there was any surplus from the sale, the

said sum shall be paid to the plaintiffs. There were thus two appeals. In the first appeal ('Appeal 638'), the plaintiffs appealed against the decision of the High Court Judge in dismissing the plaintiffs' claim against the fourth defendant while the second appeal ('Appeal 803') was the first defendant's appeal against the decision of the trial judge in allowing the plaintiffs' claim.

Held (allowing plaintiffs' appeal in Appeal 638; affirming decision in Appeal 803)

Per Asmabi Mohamad JCA delivering the judgment of the court:

(1) The plaintiffs had successfully proven that the purchase price for the said property had been fully settled by the deceased thus the deceased was the rightful owner of the property. The first defendant had failed to challenge the evidence of the plaintiffs. The trial judge had rightly invoked the provision of s. 114(g) of the Evidence Act 1950 against the first defendant due to the non-calling of the second and third defendants in court as these defendants had personal knowledge of the matter and would be in a better position to provide the best evidence for the first defendant. The burden lay on the first defendant to call the second and third defendants to testify on its behalf. With respect to Appeal 803, the trial judge had sufficiently evaluated the evidence before him and had correctly allowed the plaintiffs' claim against the first defendant. Hence, there was no appealable error on the part of the trial judge that merited curial intervention. (paras 28, 29, 32, 33 & 47)

(2) The first defendant stood in the position of a 'bare trustee' to the deceased. As a 'bare trustee', the first defendant could not deal with the property or treat it as if the property belonged to him. A vendor who is a 'bare trustee' has no beneficial interest in the property. Therefore, the said vendor was not authorised by law to sell, transfer or deal with the property to the new purchaser or holder of any interest in the land. There was sufficient evidence that the first plaintiff had taken possession of the property and had been paying quit rents and assessment bills to the proper authorities. Further, an irrevocable power of attorney had been executed. The deceased had the sole right to deal with the property. Thus, the transaction entered into by the first defendant and the fourth defendant for the purpose of the financing facilities was void *ab initio*. The trial judge had misdirected his mind as to the law and fact when His Lordship ruled that the fourth defendant was a *bona fide* party and was not negligent in causing the charge over the property to be registered in its favour. With respect to Appeal 638, the trial judge failed to judicially appreciate the evidence so as to render his decision plainly wrong and upon curial scrutiny merited appellate intervention. (paras 43, 46 & 48)

***Bahasa Malaysia** Headnotes*

Plaintif-plaintif adalah pentadbir-pentadbir bersama estet Nor Zainir Rahmat ('si mati'). Menurut satu perjanjian jual beli, si mati bersetuju untuk membeli sebidang hartanah ('hartanah') daripada syarikat defendan pertama ('defendan pertama') dan telah membuat bayaran penuh. Melalui surat kuasa wakil pertama, defendan pertama menamakan si mati sebagai 'wakil' hartanah itu, diikuti dengan surat kuasa wakil kedua di mana si mati melantik isterinya, plaintif pertama, sebagai 'wakil ganti'. Selepas kematian si mati, plaintif pertama mendapati bahawa defendan pertama, yang bukan lagi pemilik hartanah, telah menggadai hartanah itu kepada sebuah bank ('defendan keempat'). Plaintif mendaftarkan satu kaveat persendirian ke atas hartanah itu tetapi ia telah disingkirkan. Defendan keempat menyerahkan pada plaintif pertama kertas-kertas kausa berkaitan tindakan yang dimulakan oleh defendan keempat, menuntut antara lain, satu perintah untuk jualan hartanah. Satu perintah untuk jualan hartanah dibenarkan dan hartanah dijadualkan untuk lelong. Plaintif-plaintif memfailkan tindakan untuk mendapatkan balik hartanah itu. Hakim bicara membenarkan tuntutan plaintif terhadap defendan pertama dan mengisytiharkan si mati sebagai pemilik benefisial hartanah. Walau bagaimanapun, tuntutan plaintif-plaintif terhadap defendan keempat ditolak dan hakim bicara memerintahkan defendan keempat meneruskan dengan lelongan hartanah bagi mendapat semula jumlah yang terhutang kepadanya dan jika terdapat lebihan daripada jualan, jumlah tersebut akan dibayar kepada plaintif-plaintif. Dengan itu, terdapat dua rayuan. Dalam rayuan pertama ('Rayuan 638'), plaintif-plaintif merayu terhadap keputusan Hakim Mahkamah Tinggi ('HMT') menolak tuntutan plaintif terhadap defendan keempat sementara rayuan kedua ('Rayuan 803') adalah rayuan defendan pertama terhadap keputusan hakim bicara dalam membenarkan tuntutan plaintif-plaintif.

Diputuskan (membenarkan rayuan plaintif-plaintif dalam Rayuan 638; mengekalkan keputusan dalam Rayuan 803)
Oleh Asmabi Mohamad HMR menyampaikan penghakiman mahkamah:

(1) Plaintif-plaintif berjaya membuktikan harga jualan untuk hartanah tersebut telah diselesaikan sepenuhnya oleh si mati, oleh itu si mati adalah pemilik sah hartanah tersebut. Defendan pertama gagal mencabar keterangan plaintif-plaintif. Hakim bicara telah dengan betul mengguna pakai peruntukan s. 114(g) Akta Keterangan 1950 terhadap defendan pertama atas kegagalannya memanggil defendan kedua dan ketiga ke mahkamah kerana defendan-defendan ini mempunyai pengetahuan peribadi berkenaan perkara ini dan akan berada dalam kedudukan yang lebih baik untuk membekalkan keterangan yang terbaik untuk defendan pertama. Beban dikenakan atas defendan pertama untuk memanggil

defendan kedua dan ketiga untuk memberi keterangan bagi pihaknya. Untuk Rayuan 803, hakim bicara telah menilai bukti dengan secukupnya dan telah dengan betul membenarkan tuntutan plaintif-plaintif terhadap defendan pertama. Dengan itu, tiada kekhilafan oleh pihak hakim bicara yang mewajarkan campur tangan untuk pembetulan.

(2) Defendan pertama berada dalam kedudukan 'pemegang amanah' si mati. Sebagai 'pemegang amanah', defendan pertama tidak boleh berurusan dengan hartanah itu atau menganggap hartanah itu miliknya. Seorang penjual yang merupakan 'pemegang amanah' tidak mempunyai kepentingan bermanfaat ke atas hartanah itu. Oleh itu, penjual tersebut tidak mempunyai kuasa undang-undang untuk menjual, memindah milik atau berurusan dengan hartanah itu kepada pembeli baru atau pemegang apa-apa kepentingan dalam hartanah itu. Terdapat keterangan memadai bahawa plaintif pertama telah mengambil milikan ke atas hartanah itu dan telah selama ini membayar cukai tanah dan bil cukai pintu kepada pihak-pihak berkuasa. Tambahan, kuasa wakil yang tidak dapat dibatalkan telah dilaksanakan. Si mati mempunyai hak tunggal menangani hartanah itu. Oleh itu, urus niaga yang dibuat oleh defendan pertama dan defendan keempat bagi tujuan kemudahan pembiayaan adalah tak sah *ab initio*. Hakim bicara telah tersalah arah berkenaan undang-undang dan fakta apabila memutuskan bahawa defendan keempat adalah pihak *bona fide* dan tidak cuai dalam menggadaikan hartanah itu memihak padanya ke atas hartanah didaftarkan memihak padanya. Untuk Rayuan 638, hakim bicara gagal menghargai secara kehakiman keterangan yang dikemukakan, menjadikan keputusannya salah dan apabila diteliti untuk pembetulan, mewajarkan campur tangan rayuan.

Case(s) referred to:

Formosa Resort Properties Sdn Bhd v. Bank Bumiputra Malaysia Bhd [2010] 6 CLJ 530 CA ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Maju Holdings Sdn Bhd v. Fortune Wealth (H-K) Ltd & Other Appeals [2004] 4 CLJ 282 CA ***(refd)***

MBf Leasing Sdn Bhd v. Eng Poh Hong [2004] 6 CLJ 473 HC ***(refd)***

OCBC Bank (Malaysia) Bhd v. Pendaftar Hakmilik Negeri Johor Darul Takzim [1999] 2 CLJ 949 CA ***(refd)***

Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar & Co [1979] 1 LNS 119 FC ***(refd)***

Yeong Ah Chee v. Lee Chong Hai & Anor And Other Appeals [1994] 3 CLJ 20 SC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 91, 103, 114(g)
National Land Code, s. 340(2)

For the appellants - Tan Chong Lii; M/s Akberdin & Co
For the 1st respondent - Harjinder Singh Sandhu; M/s Ranjit Ooi & Robert Low
For the 4th respondent - Malcom Fernandez, Muhd Hadzwan & Mark Cheng; M/s C Sukumaran & Co

[Editor's note: Appeal from High Court, Shah Alam; Suit No: 22-NCVC-307-04-2013 (overruled in part).]

Reported by Suhainah Wahiduddin

JUDGMENT

Asmabi Mohamad JCA:

Introduction

[1] There are two appeals fixed before us. Appeal No. B-02(NCVC)(W)-638-04-2016 ("Appeal No. 638") is an appeal by the appellants, Bulyah binti Ishak and Noraini binti Abdullah, the administrators of the estate of Nor Zainir bin Rahmat (the first and second plaintiff/plaintiffs against of the decision of the learned High Court Judge of Shah Alam ("the learned judge") dated 7 March 2016 made after a full trial, which dismissed the plaintiffs' claim against AmBank (M) Berhad ("the fourth defendant") with costs of RM15,000.

[2] Appeal No. B-02(NCVC)(W)-803-04-2016 ("Appeal No. 803") is an appeal by the appellant, He-Con Sdn Bhd (the first defendant) against part of the decision of the learned judge which allowed the plaintiffs' claim against the appellant as per prayer (p) of the statement of claim, a declaration that the deceased was the beneficial owner of a 3½ storey shop lot at No. 31, Jalan Tengku Ampuan Zabedah J9/J, Seksyen 9, 40100 Shah Alam, Selangor Darul Ehsan under Title No. HDS 151345, Lot No. P.T. 917 Mukim Bandar Shah Alam, Daerah Petaling, Selangor ("the property") with costs of RM15,000.

[3] Both Appeal No. 638 and Appeal No. 803 were consolidated *vide* an order of this court dated 31 May 2016. Parties had also informed the court that for the purpose of these two appeals they would be referring to the records of appeal as in Appeal No. 638.

[4] We will refer to the parties as they were described in the High Court.

Brief Background Facts

[5] The plaintiffs are the joint administrators of the estate of Nor Zainir bin Rahmat, the deceased ("the deceased") who passed away on 26 June 2002. The first plaintiff is also the widow of the deceased.

[6] The first defendant, who is the appellant in Appeal No. 803 is a company set up under the Companies Act 1965. The first defendant has since been wound up. The second and third defendants are directors of the first defendant. Both the second and third defendants are bankrupts.

[7] The fourth respondent ("the fourth defendant") is a licensed financial institution which registered address is at Level 22, Bangunan AmBank Group, Jalan Raja Chulan, 50200 Kuala Lumpur.

[8] Pursuant to a sale and purchase agreement dated 22 December 1997 ("the agreement"), the deceased agreed to purchase the property from the first defendant. The deceased paid the purchase price in full (see exhs. P1 & P2 at pp. 584-594 & 665-668 vol. 2(3) of appeal record (AR)).

[9] By a power of attorney dated 26 April 2002 which was registered in the High Court of Kuala Lumpur on 30 April 2002 under presentation no. 29803/02, the first power of attorney (see exh. P2 at pp. 665-668 vol. 2(3) AR), the first defendant appointed and/or named the deceased the "attorney" of the property. Paragraph 3, of the first power of attorney states that it is an irrevocable power of attorney.

[10] Pursuant to the power of attorney dated 21 May 2012, registered in the High Court of Kuala Lumpur on 19 July 2002 *vide* presentation no. 18192/02, the second power of attorney (see exh. P3 at pp. 669-674 vol. 2(3) of AR), the deceased appointed the first plaintiff as the "substitute attorney".

[11] The deceased died on 26 June 2002. The letters of administration was issued on 9 November 2005 *vide* petition no. S7-31-280-2004. Both the plaintiffs were appointed as administrators of the estate of the deceased (see exh. P5 at pp. 606-609 vol. 2(3) AR)).

[12] At the time the title of the said property was to be issued, the first plaintiff had requested that the title to be registered in her name. However, the developer refused to give its consent for direct transfer (see exhs. P7, P8, P9, P10, P11 (at pp. 595-596, 597-598, 599, 600-601, 602-603 vol. 2(3) of AR).

[13] The first plaintiff later found out the stamp duties and assessment bills for the said property were in the sum of RM110,355.60. The sum was too high, the first plaintiff could not afford to pay the stamp duties and the assessment as she had three small children to support. Due to financial constraint, the first plaintiff postponed the idea to effect the transfer of the property to her name.

[14] The first plaintiff obtained the order from the Kuala Lumpur High Court to administer the property *vide* vesting order dated 9 December 2008 (See exh. P6 (at pp. 615-616 of vol. 2(3) of AR 2(3)).

[15] Towards the end of 2011, the first plaintiff discovered that the first defendant, who was no longer the owner of the property, having sold it to the deceased and received the full purchase price, had charged the property to the fourth defendant. This was done without the first plaintiff's permission and/or consent (see pp. 468-501 vol. 2(2) of AR, pp. 502-523, 524-547 of vol. 2 of AR 2(3)). The first plaintiff then lodged two police reports, on 29 November 2011 *vide* Jalan Tun Razak Police Report No. M8739/11 and on 30 July 2012 *vide* Dang Wangi Police Report No. 029961/12 respectively (see exhs. P16 & P16(a) at pp. 632 and 642 vol. 2(3) AR).

[16] On 10 January 2012, the first plaintiff lodged a private caveat over the property *vide* presentation no. 1129/2012. However, the same was removed (see exh. P7 (at pp. 655 vol. 2(3) of AR).

[17] The first plaintiff through her solicitors demanded for an explanation from the fourth defendant pertaining to the charge *vide* a letter dated 9 August 2012 (see exh. P18 at pp. 643-644 vol. 2(3) AR)). The fourth defendant responded to the said letter by serving the first plaintiff with the cause papers pertaining to the action commenced by the fourth defendant, seeking for, amongst others, an order for sale of the property as the first defendant had breached the terms and conditions of the financing facilities. An order for sale was granted and the property was scheduled for auction on 8 April 2013. However, the plaintiffs filed this action to recover the property.

[18] After hearing two witnesses for the plaintiffs and one witness each from the first and fourth defendants respectively, the learned judge allowed the plaintiffs' claim against the first defendant with cost of RM15,000. With respect to the plaintiffs' claim against the fourth defendant, the learned judge dismissed the plaintiffs' claim against the fourth defendant with costs of RM15,000. The learned judge further ordered the fourth defendant to proceed with the auction of the property to recover the amount due to it and if there is any surplus from the sale, the said sum shall be paid to the plaintiffs.

[19] The plaintiffs appeal against the learned judge's order in dismissing their claim against the fourth defendant. The first defendant on the other hand appeals against the order of the learned judge in allowing the plaintiffs' claim against the first defendant.

The Memorandum Of Appeal For B-02(NCVC)(W)-638-04-2016

[20] The summary of the issues raised in the memorandum of appeal were as follows:

(a) The learned judge erred in law and fact when the learned judge has misdirected his mind to the principles enunciated in the two Federal Court cases, *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987 (*Kamarulzaman*) and *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944 (*Samuel Naik*).

(b) The learned judge erred in law and fact when the learned judge had failed to direct his mind to the fact that after the plaintiffs' claim against the first defendant was allowed, consequentially, the plaintiffs' claim against the fourth defendant too must be allowed.

(c) The learned judge erred and misdirected himself in law and fact when he failed to direct his mind to the fact that the presentations nos. 52709/2010, 52710/2010 and 52711/2010 all dated 27 May 2010 are defeasible under s. 340(2) of the National Land Code (NLC) as the fourth defendant is the immediate holder and/or charger of the property.

(d) The learned judge had erred and misdirected himself in law and fact when he failed to direct his mind to the fact that the first defendant had no right to allow the fourth defendant to execute the instrument for the registration of the charge over the said property as the first defendant was only a "bare trustee" of the said property, having sold the same to the deceased and received the full purchase price as stated in the first power of attorney dated 26 April 2002 which was registered in the High Court Kuala Lumpur on 30 April 2002 (registration no: 29503/02).

(e) The learned judge had erred and had misdirected his mind in law and fact when he failed to direct his mind to the fact that the first defendant had no right to charge the said property and/or the fourth defendant has no right to execute the registration of the charge in its favour, as the power to do was vested on the deceased as stipulated in cl. 4 of the first power of attorney and/or the first plaintiff as stated in cl. 3 of the second power of attorney dated 21 May 2002 and registered in the High Court of Kuala Lumpur on 19 July 2002 (registration no. 13192/02).

(f) The learned judge had erred and misdirected himself in law and in fact when he decided that the fourth defendant had no knowledge about the fraud committed by the first defendant when the issue of *fides* of the fourth defendant was not relevant to its defence.

(g) The learned judge had erred and misdirected his mind in law and in fact when the learned judge, despite having decided that the deceased and/or the plaintiffs were the beneficial owners of the property went on to direct the fourth respondent to proceed with the auction of the said property and be entitled to the proceeds, the remaining balance if any, to be paid to the plaintiffs.

(h) The learned judge had erred and had misdirected his mind in law and in fact when the learned judge failed to direct his mind to the fact that the instrument pertaining to the registration of the charge by the fourth defendant was void and of no effect.

(i) The learned judge erred and had misdirected his mind in law and fact when he dismissed the plaintiffs' claim against the fourth defendant.

In The High Court

The Plaintiffs' Case

[21] Before the High Court, the following evidence was adduced through the first plaintiff (SP2) and one, Bhadarul Baharain bin Sulaiman (SP1), the solicitor involved in the preparation and execution of the agreement, powers of attorney:

(a) The deceased had purchased the property from the first defendant on 22 December 1997 *vide* the agreement ("exh. P1"). This was supported by the resolution of the Board of Directors of the first defendant ("exh. D25") (at p. 660 of vol. 2(3) of AR). The deceased had paid the full purchase price of RM2,133,651 ("exh. P2"). However, before the property could be transferred to the deceased, the deceased passed away (exh. P4 at p. 296 of vol. 2(2) of AR). Before the deceased passed away, the deceased had executed the second power of attorney dated 21 May 2002 wherein the deceased has appointed the first plaintiff as "substitute attorney" (exh. P3). Both these powers of attorney had been duly registered in Kuala Lumpur High Court (exhs. P2 & P3).

(b) At the time the agreement was executed the individual grant of the property had not yet been issued by the Land Office.

(c) During the time the powers of attorney were executed, the said property had not been fully constructed. When the property was completed around 2004, the first plaintiff had requested the developer, Sunway Masalam Sdn Bhd to register the property in the name of the deceased but the developer refused and had registered the property in the name of the first defendant instead.

(d) On 9 December 2008, the first plaintiff managed to get the consent of the court to transfer the estate of the deceased, including the property in her name (exh. P6 (at pp. 615-616 of vol. 2(3) of AR)).

(e) The first, second and third defendants were fully aware that the first plaintiff was one of the administrators of the estate of the deceased. Further after exhs. P1 and P2 were executed, the first to the third defendants were never involved in any of the transactions concerning the property.

(f) All payments of bills pertaining to quit rent and assessment were paid by the first plaintiff representing the estate of the deceased. All these receipts were in the name of the deceased (exh. P13 (at pp. 610-614) and exh. P14 (at pp. 617-624) of vol. 2(3) of AR).

(g) The first defendant agreed to transfer the said property in the name of the estate of the deceased, however they failed to do so and had fraudulently charged the said property to the fourth defendant despite knowing that the said property belongs to the deceased.

(h) The first defendant had charged the said property to the fourth defendant on 27 May 2010 as a security for financial facilities it obtained from the fourth defendant. The instruments for the purpose of the charge were executed by the second and third defendants on behalf of the first defendant without the consent of the first plaintiff as the administrator of the estate of the deceased. The first plaintiff had lodged police reports concerning this matter.

(i) SP1 was the solicitor involved with the preparation of the agreement ("exh. P1"), the first power of attorney ("exh. P2") and the second power of attorney ("exh. P3"). According to SP1, both the first defendant and the deceased agreed that the purchase price had been paid in full. SP1 was also the solicitor who was involved with the registration of the first and second power of attorney.

(j) There were elements of fraud involved which resulted in the registration of the charge instrument in favour of the fourth defendant. The fourth defendant was also negligent in not conducting a search with the proper authority to ascertain the status of the ownership of the property before or after registering the charge instruments.

Case For The First Defendant

[22] *Vide* its witness, one Tee Siew Kai (SD1), the liquidator of first defendant, the first defendant stated as follows:

(a) SD1 was appointed as the liquidator of the first defendant *vide* an order of the Shah Alam High Court dated 10 December 2012. SD1 became aware of the plaintiffs' claim only on 1 April 2013. He tried to contact the first defendant's directors, Teo Beng Hur and Narrimah binti Abdullah ("the second and third defendants cited herein") requesting them to hand over, amongst others, the statement of affairs", books and records relating to the first defendant in their possession but until the time he stood as the witness in court these defendants had not responded. Despite reminders having been sent there was no response from any of them.

(b) During SD1's examination of the affairs of the first defendant, SD1 discovered a director's resolution dated 26 April 2004 authorising the first defendant to enter the first power of attorney with the deceased with respect to the sale and purchase of the property together with unattested

copy of the first alleged power of attorney signed by the second and third defendants. SD1 had also confirmed the existence of the agreement and the two powers of attorney. From the documents, SD1 obtained from the receiver & manager SD1 also sighted the agreement, first and second powers of attorney.

(c) SD1 could not verify the authenticity of the documents as he had no personal knowledge.

(d) SD1 could not retrieve any documents to prove the payment of the purchase price in the sum of RM213,363.10 and RM1,920,267.90 respectively, allegedly paid by the deceased to the first defendant. According to SD1, there was nothing to prove that the sale and purchase of the property had been concluded.

(e) SD1 confirmed that he did not send exh. P2 for analysis by a handwriting expert to ascertain the authenticity of the document as well as the signatures contained in the document which were relied by the plaintiffs.

(f) SD1 testified that he had no personal knowledge pertaining to the agreement and all transactions involving the said property.

(g) According to SD1, the first defendant is hopelessly insolvent and does not have any available cash. The first defendant will not be able to satisfy the judgment, in event judgment is awarded to the plaintiffs.

Case For The Fourth Defendant

[23] The fourth defendant through its manager, one Michael Khong Khai Tuck (SD2) testified as follows:

(a) The fourth defendant had granted general banking facilities to the first defendant consisting of contract financing facility, overdraft facility and trade facility. A facility agreement was executed between the first defendant and the fourth defendant.

(b) The first defendant was required to provide security with respect of the banking facilities. There was a resolution of the directors of the first defendant dated 10 September 2009 which resolved that the first defendant shall create a first party charge over the property. As a result of that three charges were created by the first defendant in favour of the fourth defendant.

(c) Before executing the charge instruments, the fourth defendant had conducted a proper search on the property and found that the first defendant was the registered owner of the property and the property was free from all encumbrances. However, the fourth defendant did not see it fit to visit and/or view the property.

(d) As the first defendant had breached the terms of financing agreement, the fourth defendant then terminated the financing agreement, withdrew all facilities granted to the first defendant and commenced proceedings to obtain an order for sale of the property from the Kuala Lumpur High Court.

(e) At the time the first defendant applied for the financing facilities, the fourth defendant had no information pertaining to the existence of the agreement between the first defendant and the deceased and/or the existence of the power of attorney executed by the deceased and the first defendant and the "substitute attorney". Neither was there any site visit made to the property.

The Decision Of The High Court

[24] The findings of the learned judge are as follows:

(a) The deceased is the owner of the property as the deceased had purchased the property and paid the full purchase price of the property to the first defendant. The evidence of the plaintiffs pertaining to the above was more probable as compared to the first defendant. The plaintiffs' evidence was supported by documentary evidence in the form of exh. P2 which confirmed that the full purchase price had been paid to the first defendant.

(b) Exhibit P2 was signed by the manager of the first defendant and witnessed by the plaintiffs' witness, SP1, an advocate and solicitor. Exhibit P2 was duly stamped in accordance with the applicable law. The first, second and third defendants had never disputed the signing of the document and/or claim that the same is false. The second and third defendants were not called by the first defendant to challenge the evidence of the plaintiffs.

(c) The burden is on the first defendant to secure the attendance of the second and third defendants as witnesses in court to prove their case.

(d) The first defendant had not taken steps to challenge the authenticity of the document by sending the same to the handwriting expert for verification. No police report was lodged by the first defendant. Only the second and third defendants would be in a position to challenge the plaintiffs' evidence. The learned judge had invoked the provision of s. 114(g) of the Evidence Act 1950 against the first defendant.

(e) The first defendant could not prove its allegation that the deceased did not have the means to pay that huge sum of money to the first defendant. The first defendant could not counter the overwhelming evidence offered by the plaintiffs in the form the agreement and the first and second powers of attorney.

(f) The fact that the first defendant is the immediate owner of the property was not disputed. The first defendant had bought the property when it was still under construction. The ownership can still be disputed and/or the title is defeasible if the elements mentioned under s. 340(2) of the NLC existed.

(g) There were affirmative findings that the deceased was the lawful owner of the property. The first defendant knew from the outset that the purchase price had been paid in full to the first defendant. As such the first defendant was holding the property as a "bare trustee" for the deceased and had no right to deal with the property.

(h) As the first power of attorney was an irrevocable power of attorney and for valuable consideration, all rights and interest in the property had been transferred to the deceased and subsequently by virtue of the second power of attorney the rights and obligations had been transferred by the deceased to the first plaintiff.

(i) The first defendant failed to produce evidence to show that the administrators of the estate of the deceased had given permission and/or mandate to first defendant to charge the property as a security for financial facilities granted to it by the fourth respondent.

(j) The property belongs to the deceased and the first defendant was merely holding the property as a "bare trustee" for the deceased. Therefore, the first, second and third defendants had no power and/or authority to charge the property to the fourth defendant as a security for the financing facilities the first defendant took from the fourth defendant.

(k) The fourth respondent was a *bona fide* party. There was no evidence to prove that the fourth defendant was negligent. Further, it was disclosed during the trial that the approach taken by the plaintiffs was that the first, second and third defendants had intentionally suppressed the information pertaining to exh. P1, P2 and D25 from the fourth defendant at the time the application for the facilities was made.

(l) The fourth defendant had taken all reasonable measures to verify the status of the property before the loan was approved. The search conducted by them proved that the first defendant was the owner of the property and the property was free from all encumbrances. Based on the aforesaid the plaintiffs had failed to prove that the charge was void and unenforceable.

(m) The fact that the first defendant had breached the terms of the financing facilities was not disputed. The process undertaken by the fourth defendant in securing the order for sale is in order, the forfeiture of the property was in accordance with the law. Therefore, the fourth defendant has the right to proceed with the said auction, any amount remaining from the sale shall be paid to the plaintiffs.

Our Decision

The Law

[25] We were mindful of the limited role of the appellate court in relation to findings of facts made by the court of first instance.

[26] In the course of that, we had sought guidance from the very often quoted case of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97 where the Court of Appeal held as follows:

> an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.

[27] Reference is also made to the decision of the Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 where the Federal Court held that the test of "insufficient judicial appreciation of evidence" adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly on the basis of the relevant law and the established evidence.

The Appeals Before Us

Appeal No. 803

[28] Having heard the evidence of the plaintiffs' witnesses and the evidence of SD1 as well as the documents that were tendered in court, the learned judge accepted the evidence of the plaintiffs as being more probable as compared to the evidence of SD1. The learned judge went on to rule that the plaintiffs had successfully proven that the purchase price for the said property had been fully settled by the deceased based on the evidence of the first plaintiff (SP2) and the solicitor (SP1) responsible for the preparation and execution exhs. P1, P2 and P3 respectively. The evidence of the plaintiffs was further supported by exh. D5, the first defendant's circular resolution dated 26 April 2002 which authorised the second defendant to sign all documents pertaining to the power of attorney on behalf of the first defendant. The learned judge held that the deceased is the rightful owner of the property.

[29] The first defendant failed to challenge the evidence of the plaintiffs pertaining to the existence of exhs. P1, P2 and P3 or D5, as SD1 had no documents with him. All documents relevant to the case are still in the possession of the second and third defendants who were not called as witnesses for the first defendant. Neither, SD1, the first defendant or the second and third defendant for that matter had taken steps to challenge the

authenticity of exh. P2. No police report was lodged and/or the documents sent for analysis to ascertain the authenticity of this document. Neither did SD1 verify with the second and third defendants if they had executed the same as they were the very persons who would be in the position to verify the authenticity of the document.

[30] We noted that SD1 was appointed as a liquidator for the first defendant only on 10 December 2012 *vide* an order of the Shah Alam Court dated 10 December 2012. SD1 testified that he became aware of the plaintiffs' claim only on or about 1 April 2013. SD1 had also testified that he had no knowledge pertaining to exhs. P1, P2 and P3 and other documents of the first defendant as the same are still in the possession of the second and third defendants who had refused to accede to SD1's request to provide the documents. We observe exhs. P1, P2 and P3 were executed on 22 December 1997, 26 April 2002 and 30 April 2002 respectively. The terms of exh. P2 are clear. Therefore, no evidence shall be given in proof of the terms of exh. P2 except the document itself. When the terms of the agreement have been reduced to writing, parties are bound by the terms of the agreement and the agreement could only be proved by the agreement itself (see s. 91 of the Evidence Act 1950; *Tindok Besar Estate Sdn Bhd v. Tinjar & Co* [1979] 1 LNS 119; *MBf Leasing Sdn Bhd v. Eng Poh Hong* [2004] 6 CLJ 473).

[31] As SD1 has no personal knowledge pertaining to the facts surrounding the sale and purchase of the property and/or the execution of exhs. P2 and P3, having come to the scene many years after exhs. P1, P2 and P3 were executed and had no documents with him, he would not be in the position to offer evidence to the contrary to disprove the plaintiffs' case.

[32] We are of the view that the learned judge had rightly invoked the provision of s. 114(g) of the Evidence Act 1950 against the first defendant due to the non-calling of the second and third defendants in court as these defendants had personal knowledge of the matter and would be in a better position to provide the best evidence for the first defendant. The burden lies on the first defendant to call the second and third defendants to testify on its behalf. This finding is in line with the provision of s. 103 of the Evidence Act 1950 (see *Maju Holdings Sdn Bhd v. Fortune Wealth (H-K) Ltd & Other Appeals* [2004] 4 CLJ 282; *Formosa Resort Properties Sdn Bhd v. Bank Bumiputra Malaysia Bhd* [2010] 6 CLJ 530).

[33] Based on the aforesaid, we found that the findings of the learned judge are predicated on the evidence that was presented before him. Hence we found no appealable error on the part of the learned judge that merit curial intervention.

A Appeal No. 638

[34] Turning now to the appeal filed by the plaintiffs against the decision of the learned judge to dismiss the plaintiffs' claim against the fourth defendant. It was the contention of the plaintiffs, once the claim of the plaintiffs against the first defendant is allowed, the plaintiffs' claim against
B the fourth defendant ought to be allowed.

[35] Having resolved that the first power of attorney is an irrevocable power of attorney and for valuable consideration and that the deceased is the rightful owner of the property, the next issue to be considered is whether the
C learned judge was right in dismissing the plaintiffs' claim against the fourth defendant. As shown above, the fourth defendant is a financial institution which had provided the financial facilities to the first defendant with the property being pledged as a first party charge in favour of the fourth defendant.

D **[36]** The fourth defendant argued that it had no knowledge about the claim. Based on its own search, the fourth defendant was satisfied, the first defendant is the registered owner of the property. The plaintiffs were not privy to the charge which only involved the first defendant and the fourth defendant.

E **[37]** The next issue to be considered is whether for the purpose of s. 340(2) of the NLC knowledge and *fides* of the fourth defendant are relevant.

[38] Section 340(2) of the NLC states that the title and interest of a person or body shall not be indefeasible:

F (a) In the event of fraud or misrepresentation where the person or body, or agent of the person or body was privy to;

(b) In cases where the registration was secured by forgery, or by mean of an insufficient or void instrument.

G **[39]** Subsection 340(3) of the NLC states that in cases where the title or interest of any person or body is not indefeasible due to the circumstances illustrated above, it shall be liable to be set aside in the hands of any person or body to whom it may be subsequently transferred.

[40] Learned counsel for the plaintiffs had stated in the memorandum of
H appeal that the learned judge had erred and misdirected himself in law and in fact when His Lordship had ignored the established principles enunciated in the Federal Court case of *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987 ("*Kamarulzaman*") and followed by *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944 ("*Samuel Naik*") which provide the trial courts the guide on how to deal with the situation when the challenge is made
I under s. 340(2) as follows:

(a) Firstly, the court must ascertain if the title or interest in dispute is registered in the name of an immediate purchaser or a subsequent purchaser;

(b) In the event the title or interest is registered in the name of an immediate purchaser, the court will not "offer a shield of indefeasibility". The title is still liable to be set aside.

[41] Guided by the above high authorities against the factual matrix of the case at hand, we are satisfied that the fourth defendant is an immediate holder of the charge. Therefore, as illustrated above, the *fides* of the fourth defendant are irrelevant.

[42] The plaintiffs argued as the learned judge had ruled that the deceased is the rightful owner of the property as he had paid the full purchase price, the first defendant is merely holding the said property as a "bare trustee" to the deceased. In view of this, the learned judge ought to have made a finding that the plaintiffs' case against the fourth defendant ought to be allowed.

[43] We found merit in this argument. After having made the findings the full price for the said property had been paid, the first defendant stood in the position of a "bare trustee' to the deceased. As a "bare trustee", the first defendant could not deal with the property or treat as if the property belong to him. Further, in this case, an irrevocable power of attorney had been executed. Clause 4 of exh. P2 states that the deceased had the sole right to deal with the property. In view of the aforesaid, the transaction entered into by the first defendant and the fourth defendant for the purpose of the financing facilities is void *ab initio*. Hence, the learned judge ought not to have dismissed the plaintiffs' case against the fourth defendant. Obviously, His Lordship's decision to dismiss the plaintiffs' claim and allow the fourth defendant to proceed with the order for sale of the property went against the principle enunciated in *Kamarulzaman* and *Samuel Naik*. From the cases cited herein, a vendor who is a "bare trustee" has no beneficial interest in the property. Therefore, the said vendor is not authorised by law to sell, transfer or deal with the property to the new purchaser or holder of any interest in the land. There is sufficient evidence before us that the first plaintiff had taken possession of the property and had been paying quit rents and assessment bills to the proper authorities (see para. 20(f)) of this grounds of judgment).

[44] Learned counsel for the plaintiffs had referred us to the Supreme Court case of *Yeong Ah Chee v. Lee Chong Hai & Anor and Other Appeals* [1994] 3 CLJ 20 where it was held that "When the full purchase price is paid, the vendor becomes a bare trustee for the purchaser". In *OCBC Bank (Malaysia) Bhd v. Pendaftar Hakmilik Negeri Johor Darul Takzim* [1999] 2 CLJ 949 the Court of Appeal clarified that the word "interest" used in s. 340(2) of the NLC also applies to an interest in the form of a charge or a lease.

[45] Notwithstanding the fact that the plaintiffs in this case had not taken steps to lodge a caveat, it did not mean that the plaintiffs' rights and interest are vitiated, as in law a caveat does not create interest or rights (see *Samuel Naik (supra)*).

[46] We found, the learned judge erred and misdirected his mind as to the law and fact, when His Lordship ruled that the fourth defendant was a *bona fide* party and was not negligent in causing the charge over the property to be registered in its favour. There is clear and blatant disregard to the established principles enunciated in *Kamarulzaman* and *Samuel Naik* as discussed above.

Conclusion

[47] Having examined the pleadings, the notes of proceedings, and having heard the respective learned counsel, we found that with respect to Appeal No. 803, the learned judge had sufficiently evaluated the evidence before His Lordship both testimonial and documentaries and had correctly allowed the plaintiffs' claim against the first defendant. We are satisfied there was no appealable error which merit our intervention.

[48] With respect to Appeal No. 638, as we have illustrated in the preceding paragraphs, we found that the learned judge fell into error in failing to appreciate the principles of law enunciated in in *Kamarulzaman* and *Samuel Naik*. We were constrained to hold that the learned judge failed to judicially appreciate the evidence and/or the law presented before him so as to render his decision plainly wrong and upon curial scrutiny merit our appellate intervention.

[49] Based on the aforesaid, we unanimously affirm the learned judge's decision which allowed the plaintiffs' claim against the first defendant with costs of RM15,000. With respect to the plaintiff's appeal against the decision of the learned judge which dismissed the plaintiffs' claim against the fourth respondent, we allowed the plaintiffs' appeal with costs of RM15,000. Accordingly, we set aside the order of the learned judge. We further order that the costs shall be subject to payment allocatur fees.

[50] We therefore ordered accordingly.